

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GWEN K. BENNETT :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the :
Tax Law for the Years 1991 through 1995. :

ORDER
DTA NO 818612
AND 818613

In the Matter of the Petition :
of :
PATRICK R. BENNETT :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the :
Tax Law for the Years 1991 through 1995. :

Petitioners, Gwen K. Bennett, 3837 Peterboro Road, Oneida, New York 13421, and
Patrick R. Bennett, P.O. Box 1000, Otisville, New York 10963, filed petitions for
redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax
Law for the years 1991 through 1995.

On December 3, 2001, the Division of Taxation, by its representative Barbara G. Billet,
Esq. (Kevin R. Law, Esq., of counsel) filed a motion for an order vacating a Demand for a Bill of
Particulars. Petitioners did not respond to the motion by the return date of January 2, 2002.
Petitioners appear by Harry Hood, C.P.A. Based on the pleadings and motion papers, Jean
Corigliano, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On July 3, 2001, petitioners Gwen K. Bennett and Patrick R. Bennett filed separate petitions for redetermination of notices of deficiency of personal income tax. The facts alleged in each petition are substantially the same.

2. The Division of Taxation (“Division”) timely filed an answer to each petition. The first four paragraphs of each answer contain denials of facts alleged in the petitions. Paragraphs 5 through 11 of each answer affirmatively set forth the facts relied on by the Division as the basis for the issuance of notices of deficiency to petitioners.

3. By letter to the Division's representative, dated November 15, 2001, petitioners' representative made a demand for a bill of particulars. Paragraphs 1 through 6 of the demand request particulars with regard to the answer to the petition of Patrick R. Bennett, and paragraphs 7 through 12 of the demand request particulars with regard to the answer to the petition of Gwen K. Bennett. In every instance, petitioners request documentation or information of an evidentiary nature.

ORDER

A. The regulations of the Tax Appeals Tribunal provide that a party may serve a demand for a bill of particulars to an adverse party in order “to prevent surprise at the hearing and to limit the scope of proof” (20 NYCRR 3000.6[a][1]). A party may move to vacate or modify the demand within 20 days after receipt of the demand (20 NYCRR 3000.6[a][1]), which the Division has done.

B. The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claim which he or she must defend against (*Johnson, Drake and Piper v. State of New York*, 43 Misc 2d 513, 251 NYS2d 500, 503). A demand for a bill of particulars

may be used to amplify the pleadings, prevent surprise and limit the issues, but may not be used to gain disclosure of evidentiary detail that adverse parties will rely on to prove their claim (*Bassett v. Bondo Sangsa Co., Ltd.*, 94 AD2d 358, 464 NYS2d 500, 501, *appeal dismissed* 60 NY2d 962, 471 NYS2d 84; *State of New York v. Horsemen's Benevolent and Protective Assoc.*, 34 AD2d 769, 311 NYS2d 511). Moreover, the bill of particulars is related to the burden of proof. A party need particularize only as to those issues on which he has the burden of proof (*Holland v. St. Paul Fire & Marine Ins. Co.*, 101 AD2d 625, 475 NYS2d 156, 157).

In 3 Weinstein-Korn-Miller, NY Civ Prac, ¶ 3041.11, the following observation is made:

If a rough formula can be derived from the [case law], it is probably one predicated on the volume of information requested and *whether it will limit the issues and assist in their crystallization or whether the information appears to be sought for purposes of trial preparation*. . . . The request must be viewed in light of the pleading it is intended to particularize. If the pleading is prolix, ambiguous or conclusory, a party may be given wider latitude in his request for a bill than might otherwise be the case. At the other extreme, however, if the pleading is sufficiently detailed, the court may deny a request for a bill under the assumption that evidence is being sought.

C. Without a doubt, the demands made by petitioners seek evidence from the Division. The Division's answers are clear, concise and thorough. The basis for the issuance of the notices of deficiency is set forth in detail, and the answers adequately inform petitioners of both the scope of the issues to be addressed at hearing and of the Division's position with regard to those issues. Moreover, petitioners seek to have the Division particularize with regard to matters on which it carries no burden of proof. Therefore, the Division's motion to vacate the Demand for a Bill of Particulars is granted.

DATED: Troy, New York
January 17, 2002

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE